Cassy O'Connor, Greens Leader
Rosalie Woodruff, Greens Member for Franklin

Thursday, 27 February 2020

Mr Gregory Mellick SC
Chief Commissioner
Integrity Commission
GPO Box 822
Hobart TAS 7001

Dear Chief Commissioner,

We are writing to refer to you Attorney-General Archer, Minister Barnett, and WorkSafe Chief Executive Mark Cocker for investigation of misconduct.

On **Thursday, 20 February**, 2020, Mr Steven Chaffer, CEO of the Bob Brown Foundation, was issued with a prohibition notice under s. 195 of the *Work Health and Safety Act 2012*.

The prohibition notice directed the Foundation to –

> *"…cease the carrying out forest protest activity throughout the State of Tasmania until such time as the Foundation has satisfied the Work Health and Safety Regulator that it is managing health and safety duties and risks to workers and others consequential to their frontline forest protest activities…"*

A failure to comply with the prohibition notice may incur a maximum penalty of $500,000. The notice was issued by Chief Executive of WorkSafe and WHS Regulator Mark Cocker.

On the following morning (**Friday 21 February**, 2020) Mark Cocker was interviewed by Leon Compton on *mornings around Tasmania* at approximately 9:10 am.

During the interview, Mark Cocker –

1. Confirmed that this is the first time a protest group has been targeted by WHS laws;

2. Stated "it has reached the point where I've formed the reasonable belief as the work health and safety regulator that workers and others are being exposed to the risk of death, injury or illness in relation to the specific activities that are being undertaken";

3. Stated that he had "no contact from Government, no advice. Nil, none whatsoever" to suggest they would like him to go down the path he took.

At 9:31am on **Friday 21st February**, 2020 Minister Barnett and Attorney General Archer issued a media release by email stating –

> *"The Government is aware and concerned that the unsafe workplace behaviours of the Bob Brown Foundation have caused significant angst in the community and referred the matter to Worksafe Tasmania."*

This media release was either never published on their website, or taken down. As of 22nd February 2020 it was not published on their website, and then by 25th February 2020 it was.

We understand that following the issuing of this media release, the Attorney-General's office frantically called journalists telling them the statement they made that the Government had referred the matter to WorkSafe was incorrect.

Later that day (**21 February** 2020) Minister Barnett spoke on ABC afternoon drive, and said the matter was not referred to WorkSafe Tasmania by the government, it was referred by an independent person in the community. When asked if the statement that the government referred the matter was wrong, Minister Barnett stated *"no, it is absolutely not"*.

In the following days Attorney-General Archer made statements to the media claiming the government did not refer this matter to Worksafe.

The Bob Brown Foundation successfully appealed the prohibition notice in the Magistrate's court on **Wednesday 26th February** 2020.

Allegations

1. **Attorney-General Archer and Minister Barnett undermined Australia's system of representative democracy, as well as the implied freedom of political speech protected by the *Constitution of Australia*, by making improper use of their power and influence as Ministers of the Crown to threaten illegitimate legal sanction against their political critics.**

We allege Attorney-General Archer and Minister Barnett, or their representatives, made it known to WorkSafe that they wanted the WHS Regulator to pursue the Bob Brown Foundation. We submit that the purpose of this was to silence or hamper the activities of their political critics, and in so doing they misused their power and influence as Ministers of the Crown.

We also submit that the legal instrument used was not applied appropriately, and that Attorney-General Archer and Minister Barnett had no interest in whether or not the instrument was appropriate.

The illegitimate use of a legal sanction for the purpose of silencing a political critic undermines Australia's system of representative democracy. Further to this, the attempt to silence protestors undermines the implied freedom of political speech protected by the Constitution of Australia.

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2. Attorney-General Archer and Minister Barnett abrogated their responsibilities as Ministers and Members of Parliament to the people of Tasmania by discriminating against people for their political beliefs and activities.

The Tasmanian *Code of Conduct for Ministers* states –

> *"Ministers must take all reasonable steps to observe relevant standards of procedural fairness in decisions made by them. Such decisions are to be unaffected by bias or irrelevant considerations."*
>
> *"Ministers are to treat everyone with respect, courtesy and in a fair and equitable manner without harassment, victimisation or discrimination."*

While the Code of Conduct does not itself define discrimination, s. 16 of the *Anti-Discrimination Act 1998* states *"A person must not discriminate against another person on the ground of any of the following attributes . . . (n) political activity"*. Political activity is a protected attribute under the *Anti-Discrimination Act 1998*.

The Government has been actively pursuing legislative reform to specifically target forest protestors in Tasmania. The fact that a piece of legislation was misapplied in order to achieve the same outcome is manifestly discriminatory conduct.

3. Attorney-General Archer and Minister Barnett lied, or seriously and wilfully misled, the Tasmanian public by claiming the Government did not refer the Bob Brown Foundation to WorkSafe Tasmania.

The Tasmanian *Code of Conduct for Ministers* states –

> *"Ministers must not mislead Parliament or the public in statements they make and are obliged to correct the Parliamentary or the public record in a manner that is appropriate to the circumstances as soon as possible after any incorrect statement is made."*

The Code of Conduct for Members of the House of Assembly, as set out in the *House of Assembly Standing & Sessional Orders and Rules* states –

> *"A Member must be scrupulous in ensuring the legitimacy and accuracy of any claim they make on the public account"*
>
> *"A Member must not mislead Parliament or the public in statements that they may make"*

Attorney-General Archer and Minister Barnett have issued two contradictory statements regarding whether or not the Government referred the matter to WorkSafe. The first was that they referred the matter to Worksafe. The second was that they did not refer the matter.

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We contend the second statement made (that the Government did not refer this matter to WorkSafe) is a lie, and as such the record remains uncorrected. We submit it is implausible the Ministers did not submit the matter to WorkSafe based on the following –

1. Legal sanctions against protestors has been a priority of this Government;

2. WorkSafe would be unlikely to pursue this matter of their own volition on the grounds that:

    a. The sanctions were highly unusual, and no similar example of this occurring has been presented; and

    b. The case was tenuous, as demonstrated by an expedient overturning of the order.

The Government changed their statement at a similar time that WorkSafe Chief Executive Mark Cocker spoke on ABC radio, when he claimed he had had no contact with the Government over this issue. The most probable explanation is that Attorney-General Archer and Minister Barnett's statement was changed to avoid the inconsistency with Mr Cocker's claim.

It is implausible that these matters are coincidental in nature.

Further to this, Minister Barnett's claim that they did not refer this matter to WorkSafe, and his subsequent statement that the earlier media release claiming they did make a referral was *not* incorrect, cannot be anything other than a lie. These two positions are directly contradictory.

4. Attorney-General Archer and Minister Barnett inappropriately politicised a critical public institution, compromising the integrity and impartiality of an institution responsible for safeguarding health and lives, likely undermining public faith in the Public Service.

In misusing public resources for political purposes, resources were allocated away from the core business of WorkSafe, an institution responsible for safeguarding health and lives.

The Tasmanian *Code of Conduct for Ministers* states –

> *"Ministers must regard the skills and abilities of public servants as a public resource to be utilised appropriately."*
>
> *"Ministers are to respect the apolitical role of the public servants."*

By misusing WorkSafe to pursue a political agenda, Attorney-General Archer and Minister Barnett clearly violated these requirements in the *Code of Conduct for Ministers*. The Tasmanian *Code of Conduct for Ministers* also states –

> *"Ministers must not by their decisions, directions or conduct in office encourage or induce public officials to break the law, or to fail to comply with a code of ethical conduct applicable to such public officials."*

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The below allegations against WorkSafe Chief Executive Mark Cocker detail the improper use of laws and the code of ethical conduct violations induced by Attorney-General Archer and Minister Barnett.

5. WorkSafe Chief Executive Mark Cocker acted in excess of his powers under the *Work Health and Safety Act 2012*, and made improper use of his role as WHS Regulator, in a manner which undermines the implied freedom of political speech protected by the Constitution of Australia.

The prohibition notice issued to the Bob Brown Foundation required that the Bob Brown Foundation "cease the carrying out [of] forest protest activity throughout the State of Tasmania", a manifest over-reach given that the State of Tasmania is not a workplace, and that the notice did not require that a forest protest activity pose any workplace injury risk.

It is also manifest over-reach by prohibiting the Foundation's involvement in "forest protest activity" anywhere in Tasmania. Without a definition to constrain the common meaning of these words, it was effectively a prohibition on any meetings, rallies, social media posts or public discussions etc. about forest protest activity.

The flawed nature of this prohibition notice is also exposed by the fact that WorkSafe immediately agreed to settle the notice during the court appeal.

Attempting to prohibit all forest protest activity throughout the State of Tasmania, regardless of risk and jurisdiction under the *Work Health and Safety Act 2012* is an improper use of the role of WHS regulator.

The threat of sanctions and the arbitrary order to desist all forest protest activity clearly undermines the implied freedom of political speech protected by the Constitution of Australia.

S.9(9) of the *State Service Act 2000* states –

> *"An employee must use Tasmanian Government resources in a proper manner."*

S. 9(13) of the *State Service Act 2000* requires that –

> *"An employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service Principles."*

The State Service Principles, as defined in s.7 of the *State Service Act 2000* includes –

> *"(1)(a) the State Service is apolitical, performing its functions in an impartial, ethical and professional manner;"*
>
> *"(1)(f) the State Service delivers services fairly and impartially to the community;"*

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6. WorkSafe Chief Executive Mark Cocker abrogated his responsibilities as a public servant by discriminating against people for their political beliefs and activities.

S. 9(3) of the *State Service Act 2000* states –

> *"An employee, when acting in the course of State Service employment, must treat everyone with respect and without harassment, victimisation or discrimination."*

As discussed previously, s. 16 of the *Anti-Discrimination Act 1998* defines political activity as a protected attribute.

The behaviour of WorkSafe Chief Executive Mark Cocker was improper; in excess of his power; undermining of implied freedom of political speech; deliberate; and for the purpose of discrimination.

During the appeal hearing, Magistrate Michael Daly observed that issuing a prohibition notice before any inspection or communication (via correspondence or visit) with the Foundation was unusual.

We submit that if you examine the usual practices of WorkSafe you will find it to indeed be an extraordinary move.

The reason for this unusual and improper approach is spelled out plainly in the prohibition notice. The intention of Mark Cocker was to prevent the carrying out of forest protest activity throughout the State of Tasmania, and not to prevent work place injury. If the goal was to prevent work place injury, then normal WorkSafe protocols would have been applied.

7. WorkSafe Chief Executive Mark Cocker publicly lied by claiming in no uncertain terms that the Government did not refer the Bob Brown Foundation to WorkSafe Tasmania.

We submit that given the government's expressed political agenda, the original statement of the two Ministers claiming responsibility for the referral, and their subsequent backpedalling on that statement coinciding with Mark Cocker's radio statements, it is highly improbable the Government did not make its views known on this matter to WorkSafe prior to the issuing of the prohibition notice.

S. 9(10) of the *State Service Act 2000* states

> *"An employee must not knowingly provide false or misleading information in connection with the employee's State Service employment."*

S. 9(1) states –

> *"An employee must behave honestly and with integrity in the course of State Service employment."*

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8. WorkSafe Chief Executive Mark Cocker acted in a manner likely to undermine public faith in the Public Service.

The above allegations all contribute to undermine public faith in the Public Service. If senior public servants are able to improperly administer critical Acts to silence political critics of the Government of the day, public faith in the public service is likely to be undermined.

S. 9(13) of the *State Service Act 2000* requires that –

> *"An employee, when acting in the course of State Service employment, must behave in a way that upholds the State Service Principles."*

The State Service Principles, as defined in s. 7 of the *State Service Act 2000* includes –

> *"An employee must at all times behave in a way that does not adversely affect the integrity and good reputation of the State Service."*

On a final note, the suppression of political dissent is a serious matter that undermines the very principles on which our democracy is founded. This is one of the most serious matters that can be examined by an integrity body.

Attempts to apply the law improperly, for an improper purpose, undermines the fundamental trust that we all need to have in the fair and impartial application of our laws.

This government becomes more bold and blatant in their over-reach, and unless serious sanctions are applied when misconduct like this occurs, we believe they will continue down this path.

We urge the Commission to use the full breadth of their powers to investigate this matter.

Yours sincerely,

Cassy O'Connor MP
Tasmanian Greens Leader

Rosalie Woodruff MP
Greens Justice spokesperson

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